

In re Braker

Case No. 389-34593-H13    BAP No. OR-90-1193-OMeR    4-11-91

The BAP reversed Judge Hess and overruled his prior ruling in In re Ivory, 32 BR 788 (Bankr. D. Or. 1983), that a debtor may cure under §1322(b)(5) and reinstate a mortgage that was sold at a pre-petition foreclosure sale. The BAP ruled that, after the foreclosure sale, there is no claim against the debtor and no contractual relationship between the parties. Thus, the debtor's only remedy is to redeem under state law within the applicable time period.

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U.S. BANKRUPTCY COURT  
DISTRICT OF OREGON  
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UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re	)	BAP No. OR-90-1193-OMeR
	)	
TIMOTHY OWEN BRAKER and	)	Bankr. No. 389-34593-H13
GINGER KAY BRAKER,	)	
	)	
Debtors.	)	
	)	
STATE OF OREGON, DEPARTMENT	)	
OF VETERANS' AFFAIRS,	)	
	)	
Appellant,	)	
	)	
-v-	)	O P I N I O N
	)	
TIMOTHY OWEN BRAKER and	)	
GINGER KAY BRAKER,	)	
	)	
Appellees.	)	

Argued and Submitted on  
September 13, 1990, at Portland, Oregon

Filed - APR 11 1991

Appeal from the United States Bankruptcy Court  
for the District of Oregon

Honorable Henry L. Hess, Jr., Chief Bankruptcy Judge, Presiding

Before: OLLASON, MEYERS, and RUSSELL, Bankruptcy Judges

P 91-12(7)

1 OLLASON, Bankruptcy Judge:

2 The Department of Veterans' Affairs ("DVA") objected to  
3 a Chapter 13 plan that proposed to cure a defaulted mortgage after  
4 a foreclosure sale. The bankruptcy court confirmed the plan and  
5 the DVA appealed. We reverse.

6 **FACTS**

7 The DVA held a mortgage on debtors' home and debtors  
8 defaulted. A decree of foreclosure was thereafter entered in  
9 Oregon state court on July 26, 1989, and a writ of execution  
10 followed. The property was sold pursuant to the writ on October  
11 3, 1989. Because Oregon law does not permit lenders to recover a  
12 deficiency resulting from such a sale, the foreclosure sale  
13 extinguished the DVA's entire claim against the debtors.

14 Two days later, debtors petitioned for relief under  
15 Chapter 13 of the Bankruptcy Code. The bankruptcy court eventually  
16 confirmed a Chapter 13 plan which allowed the debtors to recover  
17 their home and make regular payments on their mortgage, while  
18 curing their default through and during the course of the plan.

19 In support of its confirmation order, the bankruptcy  
20 court found that debtors' petition was filed during the pendency  
21 of their statutory redemption rights, and, relying on In re Ivory,  
22 32 B.R. 788 (Bankr.D.Or. 1983), concluded that 11 U.S.C. section  
23 1322(b)(5) permitted the cure contemplated in debtors' plan.

24 **ISSUE**

25 The sole question presented for review is whether a  
26 Chapter 13 plan may cure and reinstate a mortgage subsequent to a  
27

1 pre-petition foreclosure sale, but prior to the expiration of a  
2 statutory right of redemption.

### 3 STANDARD OF REVIEW

4 The interpretation of the Bankruptcy Code and the  
5 relevant Oregon statute is a question of law which we review de  
6 novo. See In re Wade, 115 B.R. 222, 225 (9th Cir. BAP 1990).

### 7 DISCUSSION

8 When a petition in bankruptcy is filed, the resulting  
9 estate possesses every legal and equitable right held by the  
10 debtor. 11 U.S.C. section 541. The right of redemption can be  
11 either legal or equitable.

12 Equitable redemption developed in the common law.  
13 Originally, one who pledged realty to secure a debt gave title to  
14 the lender, and the property could be recovered only if the debt  
15 was fully paid when due. To ameliorate the harshness of default,  
16 courts of equity allowed debtors with adequate cause to redeem a  
17 defaulted mortgage. Equitable redemption rights were at first  
18 open-ended in time, leaving title uncertain for years. To prevent  
19 abuses of equitable redemption, courts of equity fashioned a  
20 deadline for seeking such relief. That deadline was the time of  
21 "foreclosure." To this day, Oregon law recognizes that the right  
22 of equitable redemption is cut off by foreclosure.

23 To temper the harshness of foreclosure, the Oregon  
24 legislature has provided a statutory redemption right. O.R.S.  
25 section 23.560(1). Like equitable redemption, it allows redemption  
26 of the property notwithstanding the debtor's default. Unlike  
27

1 equitable redemption rights, which terminate upon foreclosure,  
2 statutory redemption rights begin upon foreclosure. The statute  
3 which creates the right of equitable redemption also stakes its  
4 frontier. That statute provides, in part:

5       The mortgagor or judgment debtor whose right  
6       and title were sold, or the heir, devisee or  
7       grantee of the mortgagor or judgment debtor,  
8       who has acquired by inheritance, devise, deed,  
9       sale, or by virtue of any execution or by any  
10      other means, the legal title to the property  
11      sold, may, at any time within 180 days after  
12      the date of sale, redeem the property; provided  
13      that a transfer of the judgment debtor's  
14      interest in the property, either before or  
15      after sale, shall preclude the judgment debtor  
16      from the right to redeem unless the proceeds  
17      from the sale are insufficient to satisfy the  
18      judgment, in which event the judgment debtor  
19      shall have the right to redeem at any time  
20      within 10 days after the 180 days herein  
21      allowed for redemption, and not otherwise.

22 O.R.S. §23.560(1).

23       In re Ivory, 32 B.R. 788 (Bankr.D.Or. 1983), upon which  
24 the court below relied, held that a Chapter 13 plan can cure post-  
25 sale defaults so long as the chapter 13 petition is filed within  
26 the statutory redemption period. The court said:

27       Thus, it is clear that a debtor retains an  
28       interest in the property until the statutory  
29       redemption period has run and legal title has  
30       passed. Upon the filing of a petition under  
31       the Bankruptcy Code, all legal and equitable  
32       interests of the debtor in property as of the  
33       commencement of the case become property of the  
34       estate. 11 U.S.C. § 541. In the present case,  
35       the one year statutory redemption period, which  
36       began to run from the date of the sale on  
37       September 22, 1982, had not yet expired when  
38       the debtors filed their chapter 13 petition on  
39       March 18, 1983. Thus, the debtor's right of  
40       redemption became property of the estate at the  
41       time of the debtors' filing. The fact that the  
42       debtors still retain an interest in the sold

1 property gives them the right to effect a cure  
2 under 11 U.S.C. § 1322(b)(5).

3 32 B.R. at 791. The Ivory court expressly rejected the notion that  
4 the sale of the property affects the debtors' ability to cure under  
5 the Bankruptcy Code. 32 B.R. at 791-792. The court reasoned that  
6 state laws which limit the right to cure must yield to the  
7 supremacy of federal bankruptcy law. Id.

8 The DVA asserts that the default cannot be cured and the  
9 mortgage reinstated during the statutory redemption period, citing  
10 Justice v. Valley National Bank, 849 F.2d 1078 (8th Cir. 1988)  
11 (decided with reference to Chapter 13, upon which Chapter 12 was  
12 modeled, In re Mann Farms, Inc., 917 F.2d 1210, 1214 (9th Cir.  
13 1990)), In re Roach, 824 F.2d 1370 (3rd Cir. 1987), In re Glenn,  
14 760 F.2d 1428 (6th Cir.), cert. denied, 474 U.S. 849 (1985), and  
15 In re Tynan, 773 F.2d 177 (7th Cir. 1985). Those circuit courts  
16 held that a foreclosure sale extinguishes the contractual  
17 relationship between the debtor and the lender. An Oregon decree  
18 of foreclosure also extinguishes the mortgage contract. Call v.  
19 Jeremiah, 246 Or. 568, 571, 425 P.2d 502, 505 (1967). The circuit  
20 courts concluded that the curing of a default under 11 U.S.C.  
21 section 1322(b)(5) requires an existing contractual relationship.  
22 Justice, supra, 849 F.2d at 1085; Roach, supra, 824 F.2d at 1377;  
23 Glenn, supra, 760 F.2d at 1442; Tynan, supra, 773 F.2d at 178.  
24 Section 1322(b)(5) provides that a Chapter 13 plan may:

25 Notwithstanding paragraph (2) of this  
26 subsection, provide for the curing of any  
27 default within a reasonable time and  
28 maintenance of payments while the case is  
pending on any unsecured claim or secured claim  
on which the last payment is due after the date

1           on which the final payment under the plan is  
2           due.

3       The circuit courts reasoned the need for a contractual relationship  
4       from the common meaning of the words "cure" and "default." To have  
5       a cure, there must be a default, and to have a default, there must  
6       be a contract. Justice at 1085; Roach at 1377. Although the Ninth  
7       Circuit Court of Appeals has not considered this question, it has  
8       determined that a promissory note which had fully matured pre-  
9       petition was not susceptible of a "cure":

10           We hold . . . that the "cure" provisions of  
11           subsections (b)(3) and b(5) are inapplicable  
12           when a debt has reached its maturity date in  
13           the absence of acceleration, prior to the  
14           filing of the Chapter 13 petition.

15       In re Seidel, 752 F.2d 1382, 1383 (9th Cir. 1985).

16       The DVA also points out that because it has no right to  
17       a deficiency, it has no claim against the debtor. The default that  
18       section 1322(b)(5) contemplates curing is "any default . . . on any  
19       unsecured claim or secured claim . . . ." Since the DVA has no  
20       claim, it argues that there can be no default, and that there is  
21       nothing to cure.

22       Indeed, the record reveals no claim by the DVA against  
23       the debtors. Instead, the DVA has a judgment arising from a  
24       judicial mortgage foreclosure, and debtors have a claim against  
25       the DVA based on their statutory redemption rights.

26       In Roach, the court found nothing in section 1322 to  
27       suggest a Congressional intent for the curing of a default to  
28       extinguish a creditor's judgment rights. Roach at 1378. Nor does  
29       the Bankruptcy Code reveal any Congressional intent to modify the

1 claims of debtors against others. The plan confirmed by the court  
2 below purports to do both--it would convert the debtors' statutory  
3 redemption rights, and the DVA's judgment, into a mortgage.

4 Under the Oregon statute, redemption cannot revive the  
5 mortgage, it can only pay the debt. See Call v. Jeremiah, supra,  
6 246 Or. at 571. The code neither creates nor enhances the rights  
7 a debtor brings into the bankruptcy estate. See 11 U.S.C. section  
8 541(a)(1); In re Kaplan, 97 B.R. 572, 576 (9th Cir. BAP 1989); In  
9 re Gull Air, Inc., 890 F.2d 1255, 1261 (1st Cir. 1989). The  
10 debtors' plan, however, would have it do so.

#### 11 CONCLUSION

12 The cure contemplated by section 1322(b)(5) is a cure  
13 that provides both debtor and creditor with the equivalent of their  
14 state law rights. Cf. Butner v. United States, 440 U.S. 48, 54-  
15 55. The "cure" contemplated in debtors' plan, and prohibited by  
16 Justice, Roach, Glenn, Tynan, and Seidel, is not a cure at all.  
17 It would create new rights for the debtors while taking vested  
18 rights from the DVA, a result not contemplated by the code. We  
19 agree with the well-reasoned opinions of the circuit courts and  
20 disapprove of In re Ivory. A pre-petition foreclosure sale  
21 prevents the application of section 1322(b)(5) to cure the  
22 antecedent default.

23 **Reversed.**